

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Berkshire Handkerchief Co., Inc. :
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Corporation :
Franchise Tax under Article 9-A of the Tax Law :
for the Year Ending 2/29/76. :

AFFIDAVIT OF MAILING

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 2nd day of October, 1981, he served the within notice of Decision by certified mail upon Berkshire Handkerchief Co., Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Berkshire Handkerchief Co., Inc.
1 W. 37th St.
New York, NY 10018

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
2nd day of October, 1981.

Cornelia P. Huglund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

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of :
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AFFIDAVIT OF MAILING

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 2nd day of October, 1981, he served the within notice of Decision by certified mail upon Alexander Roth the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Alexander Roth
393 7th Ave.
New York, NY 10001

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
2nd day of October, 1981.

Genie A. Haglund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

October 2, 1981

Berkshire Handkerchief Co., Inc.
1 W. 37th St.
New York, NY 10018

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1090 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,
Kathy Pfaffenbach

STATE TAX COMMISSION

cc: Petitioner's Representative
Alexander Roth
393 7th Ave.
New York, NY 10001
Taxing Bureau's Representative

STATE TAX COMMISSION

DECISION

A formal hearing was held before Doris Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 27, 1980 at 1:25 P.M. Petitioner appeared by Alexander Roth, CPA. The Audit Division appeared by Ralph J. Vecchio, Esq. (Frank Levitt, Esq., of counsel).

II. In the event petitioner did fail to file a valid application, whether it had reasonable cause therefor.

1. On April 19, 1978, the Audit Division issued to petitioner, Berkshire Handkerchief Co., Inc. ("Berkshire"), a notice and demand for payment of cor-

poration tax due for the fiscal year ended February 29, 1976, in the amount \$14,616.58, plus interest of \$2,153.51. The entire amount was deducted by the Division from a refund owed to Berkshire for the fiscal year ended February 28, 1977.

2. Berkshire, a domestic corporation, filed an Application for Automatic 3 Month Extension for Filing Tax Report (CT-5) for the fiscal year ended February 28, 1976, with which it remitted \$15,000.00. In accordance with the instructions on said form, petitioner calculated the amount of its remittance, as follows:

1. Preceding year's tax	\$38,305.45	
2. Estimated tax for taxable period for which this extension is requested		\$30,000.00
3. If Item 2 is over \$1000: 25% of Item 2. First installment for taxable period following that covered by this application		7,500.00
4. Total Item 2 plus Item 3		37,500.00
5. Prepayments of estimated tax including carryover credit from preceding period		<u>22,500.00</u>
6. Balance due		\$15,000.00

The application was signed by Berkshire's president, Ralph I. Dweck, and dated May 4, 1976.

3. The aforementioned application was deemed invalid by the Audit Division. Chapter 895 of the Laws of 1975 increased the tax rate under Article 9-A for all taxable periods begun on or after January 1, 1975. Consequently, a corporation wishing an extension in which to make its report (for a taxable period begun on or after said date) was required to apply the new, higher rate on its application. This result was accomplished on a new application form (CT-5S) by multiplying the preceding year's tax by 111 percent.¹

¹The tax rate prior to the statutory change was 9 percent; the new rate, 10 percent.

In addition, Chapter 895 imposed a one-year surcharge of 20 percent of the tax. This amount also entered into the taxpayer's computation of the remittance due with the application for extension.

4. Petitioner had not utilized the new application form, nor had it taken into account the rate change and surcharge.

Petitioner's franchise tax return FYE 2/29/76 (dated 8/13/76)

Tax Due	\$113,943.86
First installment for FYE 2/28/77	28,500.00
Payments credited	(45,000.00)
Amount due and paid	<u>\$ 97,443.86</u>

New application for extension CT-5S (not submitted)

Tax for FYE 2/28/75	\$38,305.45	
Preceding year's tax x 111%		\$ 42,519.05
First installment for FYE 2/28/77		
25% x \$42,519.05		10,629.76
Surcharge		
20% x \$42,519.05		<u>8,503.81</u>
Remittance due		\$ 61,652.62

The Audit Division treated petitioner's application for extension as a nullity and asserted a 15 percent penalty (3 months at 5 percent per month) against the amount due as shown on petitioner's return.

5. Petitioner contended that it had not been aware of the changes in the law at the time it filed its application for extension; that the State had not distributed the new form to taxpayers; and that it had proceeded in good faith, in compliance with the law as petitioner understood it.

CONCLUSIONS OF LAW

A. That section 211.1 of the Tax Law provides that a fiscal year taxpayer shall be granted an automatic extension of three months for making its annual report, if it files with the Tax Commission within two and one-half months after the close of its fiscal year an application for extension (in such form as the Commission may prescribe by regulation) and pays the amount properly

estimated as its tax. The regulation in force for the period at issue, former 20 NYCRR 5.22, required that Form CT-5, Application for Automatic Extension, be filed and the tax due thereon be paid.

B. That the Application form submitted by petitioner set forth the following instructions:

"An automatic extension is valid only if:

* * *

b. the total tax payments for the taxable period for which this extension is requested and any credits applied thereto from the preceding taxable period equal or exceed either the tax for the preceding taxable period, if it was a taxable period of 12 months, or 90% of the tax as finally determined for the taxable period for which this extension is requested."

Thus, in order to ensure the validity of the Application, petitioner was required to remit therewith a payment at least equal to 100 percent of its tax for the preceding taxable period (fiscal year ended February 28, 1975) or 90 percent of its tax as finally determined for fiscal year ended February 29, 1976.

C. That petitioner's tax for fiscal year ended February 29, 1976, as reflected on its return, was \$97,443.86. On its application for Automatic Extension, petitioner had estimated its tax liability at \$30,000.00. Said estimate was made over two months after the close of the fiscal year at issue, a point at which petitioner could certainly be expected to be capable of providing a realistic estimate of its tax liability.

D. That under the facts presented, petitioner was not even in compliance with the requirements in effect before the statutory changes.

E. That the petition of Berkshire Handkerchief Co., Inc. is hereby denied; that the Audit Division is directed to modify the notice and demand for payment issued April 19, 1978 as follows: interest is to be accrued to the

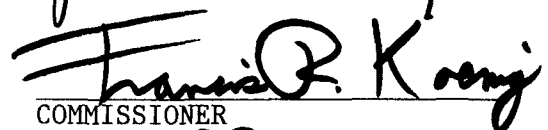
date the asserted deficiency was deducted from the refund owed petitioner for fiscal year ended February 28, 1977; and that except as so modified, the deficiency is in all other respects sustained.

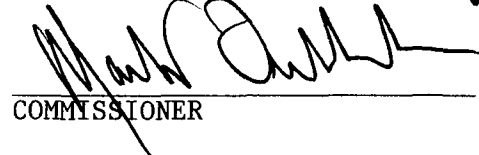
DATED: Albany, New York

OCT 02 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER